NO. 2448.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MARY M. SMITH, as Executrix of the Will of John M. Smith, Deceased,

Appellant,

vs

WILLIAM SMITH,

Appellee.

BRIEF OF APPELLANT

R. LEE WORD,
H. G. & S. H. McINTIRE
Solicitors and of Counsel for Appellant.

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STATEMENT.

The present is an appeal from a decree entered by the District Court of the United States for the District of Montana on the 10th day of February, 1914, in favor of said appellee and against said appellant. The suit in which said decree was entered was brought by the appellee to have an alleged claim he had had against John M. Smith, appellant's testator, in his lifetime, established as an allowed claim against his estate. The basis of the claim is as follows:

The said John M. Smith was, during his lifetime, guardian of the appellee; as such guardian he had received on June 14, 1899, the sum of $27,390.06, being the ward's share of certain property left by his deceased father, William A. Smith, and which sum was the proceeds of a certain sale of said property made by the executor of William A. Smith to the said John M. Smith; while acting as guardian of said appellee the said John M. Smith, acting under an order of the District Court of the State of Montana in and for the County of Meagher, in which court said guardianship matter was pending, and which had jurisdiction of the same, made and entered on December 11, 1900, used the said moneys, charging himself with interest thereon at three per cent per annum from the date of and pursuant to said order; on December 1, 1906, the said guardian filed in said state court his final account as such guardian, wherein he was charged with the amount so received by him, $27,390.06, together with interest thereon reckoned at the rate of three per cent for each of the years from December 11, 1900, to November 30, 1906, making a total of $32,918.57, and he was credited with the sum of $8,954.56 disbursements made by him as guardian for the use of said ward (Transcript, pp. 18 to 27), leaving a balance of $23,954.01; this account was by said state court approved (Transcript, pp. 174-177); and upon proof of the payment of said balance to the ward, a final decree was on December 27, 1906, entered in said matter in said state court discharging the said John M.

Smith as said guardian (Transcript, pp. 178-179); these proceedings in the state court are attacked in the present suit as fraudulent and void, and the lower court has deprived the appellant of any benefit from them (Transcript, p. 189, ll. 1 to 7); the appellee attained his majority on the 10th day of October, 1906, and some time after, in the year 1907, instituted an action against the said John M. Smith to set aside the sale of the said property from the executor of said William A. Smith to John M. Smith, and for general relief (Transcript, pp. 69 to 85); subsequent to the institution of this suit, and on October 6, 1908, the said John M. Smith died, leaving a will in which appellant was named executrix; this will was duly admitted to probate by said Meagher County District Court; letters testamentary were duly issued to her, upon which she qualified, and she was then substituted as party defendant in said suit; elaborate findings of fact were made therein and final judgment on the merits was entered in favor of defendant in said suit, appellant here (Transcript, pp. 90-112), which was on June 10, 1912, affirmed by the Supreme Court of the State of Montana (45 Mont. 535). Upon her qualification as such executrix, and in pursuance of an order of court in said proceedings, and in pursuance of § 7522 of the Revised Codes of Montana, which reads:

> "§ 7522. Every executor or administrator must immediately after his appointment, cause to be published in some newspaper in the county, if

> there be one, if not then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct; but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation,"

notice was duly published to all persons having claims against said estate to exhibit the same with the necessary vouchers as required by the laws of said state, and the office of the attorney of the said estate at White Sulphur Springs, Meagher County, Montana, was therein designated as the place where such claims might be presented and exhibited; the publication of said notice began on December 18, 1908, and was continued in pursuance of § 7523 of the Revised Codes of Montana, which reads:

> "§ 7523. The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not."

No claim of any kind of said appellee against said estate was presented or exhibited during the statutory period of publication, to-wit, within ten months from

December 18, 1908, nor at all, save that on March 14, 1913, a claim was presented by appellee, to the attorney of said estate at such designated place, whereby he claimed that said estate was indebted to him in the sum of $17,015.23, such sum being the difference in interest at the rate of eight per cent per annum, compounded annually, from June 14, 1899, and the said three per cent interest with which appellant's testator had charged himself; such claim was disallowed and rejected in pursuance of § 7525 and § 7532 of the Revised Codes of Montana, which read:

> "§ 7525. All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; *provided, however*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this Title, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; *and, provided, further*, that nothing in this Title contained shall be so construed as to prohibit the right, or limit the time of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the manner prescribed by the provisions of this Code, other than those of this Title, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure, shall be a claim against the estate, unless such debt was presented as required by the provisions of this Title."

> "§ 7532. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented,"

and thereafter, on May 17, 1913, the present action was begun thereon. An elaborate bill of complaint (Transcript, pp. 1-28) appears, and an answer thereto (Transcript, pp. 31-40). The case in due course came up for trial before the said district court. Certain testimony was introduced which appears in the statement of the evidence (Transcript, pp. 41-182) and the case was submitted. Afterwards in February a written opinion (Transcript, pp. 183-193) was filed herein upon which decree was ordered and entered on February 10, 1914 (Transcript, pp. 193-194). From this decree the present appeal is duly taken (Transcript, pp. 195-207).

The foregoing statement is taken from the undisputed allegations of the bill and answer and from the evidence preserved in said statement. We think the same sufficiently presents the contention of the appellee, and the contentions of appellant appear at length in the assignment of errors accompanying the petition on appeal. (Transcript, pp. 196-200).

SPECIFICATIONS OF ERROR RELIED ON.

1. The court erred in holding and deciding adversely to the appellant herein that the claim of appellee upon which this action is based was not one that had to be presented to the defendant herein as executrix of the estate of John M. Smith, deceased, for allowance or disallowance, during the period of publication of notice to creditors of said estate as required by § 7522, § 7525 and § 7532 of the Revised Statutes of Montana of 1907, relating to the settlement of claims against estates of deceased persons.

2. The court erred in holding and deciding that the statutes of the State of Montana relating to the presentation of claims against the estates of deceased persons was not applicable to the claim of the said appellee herein.

3. The court erred in holding and deciding that it was not necessary for appellee to present his claim against the estate of John M. Smith, deceased, to the executrix thereof within the period of publication of notice to creditors of said estate, to-wit, within ten months after the first publication of such notice, to-wit, within ten months after November 18, 1908.

4. The court erred in holding and deciding that appellee's claim herein, and upon which this action is founded, is one not arising in contract.

5. The court erred in holding and deciding that appellee's cause of action herein was not barred by

the Montana statute of limitations, to-wit, by § 6449, subdivision 4, of two years, and § 6451 of the Revised Codes of Montana of 1907, which read: (Within two years)

> "§ 6449, Sub. 4: An action for relief on the ground of fraud or mistake the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."
>
> "§ 6451: An action for relief not hereinbefore provided for, must be commenced within five years after the cause of action shall have accrued."

6. The court erred in holding and deciding that the present action is one within the exception to the Montana statute of limitations, to-wit, is one within and covered by the provisions of § 6458 of the Revised Codes of Montana of 1907, which reads:

> "§ 6458. If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

7. The court erred in holding and deciding that the Montana statute of limitations, in so far as the present action is concerned, was suspended during the absence of the appellant, executrix of the estate of John M. Smith, deceased, from the State of Montana.

8. The court erred in holding and deciding the

appellee was not guilty of laches in the bringing and prosecuting of the present action.

9. The court erred in holding and deciding that the present action was not covered by and within the judgment of the District Court of the State of Montana of the Tenth Judicial District, in and for the County of Meagher, and of the Supreme Court of said state, in favor of this appellant and against said appellee, and that the appellee was not estopped and barred from maintaining the present action by reason of said judgment, and that said judgment is not *res adjudicata* of the present action.

10. The court erred in holding and deciding that the order of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, made and entered in said court on December 11, 1900, in the matter of the guardianship of William Smith, appellee herein, which was then pending in said court, and which order permitted the borrowing by John M. Smith, the guardian, of said minor, of certain moneys belonging to him, was void.

11. The court erred in holding and deciding that the order of the said District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, whereby the final account of said John M. Smith, as guardian of said minor, was approved, and whereby the said John M. Smith, as such guardian, was discharged from his guardianship, was void and of no effect.

12. The court erred in holding and deciding that appellee had not made an election of remedies which was conclusive upon him against his maintaining the present action when he brought and maintained in the state courts of Montana, to-wit, in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, and in the Supreme Court of said state, said action, wherein and whereby he sought to set aside the sale of certain property belonging to said appellee, as a minor, to himself as guardian, in said guardianship proceeding.

13. The court erred in deciding the present action in favor of appellee and against the appellant, and in ordering and entering judgment herein in favor of said appellee and against said appellant.

14. The court erred in refusing to order and have entered judgment herein in favor of said appellant and against said appellee.

15. The decree entered herein is erroneous in that judgment is thereby awarded against the estate of John M. Smith, deceased, and against appellant as executrix thereof generally, whereas, under and by virtue of the statutes of the State of Montana the judgment, in an action such as the one at bar, should be in the event that it is in favor of the complainant that his claim is allowed and that it should be paid out of the funds of the estate in due course of administration of said estate and not otherwise, Revised Codes of Montana of 1907, § 7536, which reads:

"§ 7536. A judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment."

ARGUMENT.

As will be seen by the above specifications of error the contentions of the appellant may be subdivided under several heads, viz: Statute of Non-Claim, covered by specifications Nos. 1, 2, 3, 4; Statute of Limitations, covered by specifications Nos. 5, 6, 7; Laches, covered by specification No. 8; Former Adjudication, covered by specification No. 9; the Order of December 11, 1900, covered by specification No. 10; the Orders settling guardian's final account and discharging him, covered by specification No. 11; Election of Remedies, covered by specification No. 12; and the Decree, covered by specifications Nos. 13, 14 and 15, and we shall take up the same in that order.

I.

STATUTE OF NON-CLAIM.

In the opinion upon which the decree appealed from is based (Transcript, pp. 183-193) the lower court held that the claim of appellee was not one which by the state statute is required to be first presented to the executrix before suit could be brought upon the same. Both upon principle and direct authority we submit that in this regard said court erred, and our contention is that under the Montana statutes, if such a claim is not presented to the executrix within the time prescribed therefor, it is forever barred, and no action can be maintained thereon. The appropriate Montana statutes are:

Revised Codes, § 7522, which reads:

> "Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice,

his successor must give notice only for the unexpired time allowed for such presentation."

Revised Codes, § 7523, which reads:

"The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not."

Here the first publication was December 18, 1908, and ten months thereafter was October 18, 1909. The claim was not presented until March 14, 1913.

Revised Codes, § 7525, in so far as it applies to the present case, reads as follows:

"All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; *provided, however,* that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this Title, by reason of being out of the state, it may be presented at any time before an order of distribution is entered;"

Revised Codes, § 7530, which reads:

"When a claim is rejected either by the executor or administrator, or the judge, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred."

Revised Codes, § 7531, which reads:

"No claim must be allowed by the executor or administrator, or by the judge, which is barred

by the statute of limitations. When a claim is presented to a judge for his allowance he may, in his discretion, examine the claimant and others on oath and hear any legal evidence touching the validity of the claim."

Revised Codes, § 7532, which reads:

"No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented.

Like practically all the statutes relating to the estates of deceased persons, the legislature of Montana has taken the above enumerated statutes from those of California. Said § 7522 being § 1490 of the California Code of Civil Procedure; § 7523 being § 1491; and § 7532 being § 1500; § 1493 of the said California Code is Rev. Codes, § 7525, and reads as follows:

"All claims arising upon contract, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; *provided, however*, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by

reason of being out of the state, it may be presented at any time before a decree of distribution is entered."

The history of this section, as appears in the footnote thereto in 3 Kerr's Cyc. Codes of California, is that it was enacted March 11, 1872, it being a substantial re-enactment of the earlier act of 1860.

The annotation to Montana Revised Codes, § 7525, shows that it was enacted March 7, 1895. It follows, then, that the decisions of the Supreme Court of California construing those sections of the statute are of the most persuasive and convincing force, and as to those decisions which preceded March 7, 1895, by a familiar rule of statutory construction, it must be presumed that the decisions of the California Supreme Court were adopted with the statutes. Many California decisions appear in which it is held that under facts precisely like those in the present case the statute of Non-Claim, § 1493, of that state is applicable, and that a failure to comply with it is fatal to a right of recovery. Thus in the case of Lathrop v. Bampton, 31 Cal. 17, decided in 1866, where the facts were on all fours with the instant case, viz, an action by a ward, through her guardian, against the executor of a former, deceased, guardian, the latter being charged with having received funds of the ward, "which he never invested for the benefit of the ward, nor kept the same apart from his private account; nor kept any account thereof, or of the income or expenses therefrom between himself and his ward, but on the

contrary mixed the same with his private funds and used it in his general business, expenditures and investments, etc." The defendant (executor) having refused to account, the action was brought. No claim was ever presented to the executor as provided in the act concerning the settlement of estates of dceased persons. The lower court rendered a decree for the plaintiff, which was reversed by the supreme court. In the opinion on page 23, the excerpt from Thompson's Appeal, 22 Penn. St. 17, is quoted with approval:

> "Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the *cestui que trust.* No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the *cestui que trust,* or as the product of it, equity will follow it; and the right of reclamation attaches to it until detached by the superior equity of a bona fide purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself so long as it can be ascertained to be such. But the right of pursuing it fails when the means of ascertainment fail. This is always the case where the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description. (Story Eq. § § 1257-9; Tiffany and Bullard on Trusts and Trustees, 33, 34)."

And further:

> "Where a trustee, in violation of his trust,

invests the property or its proceeds in any other property, the *cestui que trust* may elect to hold the substituted property subject to the trust, or to hold the trustee personally liable to him for the breach of the trust. The former he can do, however, only when he can follow and identify the property, either in its original or substituted form, as we have already seen. If this cannot be done, the right of the *cestui que trust* is gone, because its exercise has become impossible, and he is therefore forced to rely upon the personal liability of the trustee; and such seems to be the condition of the *cestui que trust* in the present case. When thus forced to rely upon the personal liability of the trustee, a *cestui que trust* occupies a position towards the estate of the trustee which is no better, but *is identical with that of a simple contract creditor.* He has no special lien upon the general estate of the trustee which is superior to that of any other creditor; for the specific property covered by the trust is gone, and nothing is left to the *cestui que trust* except a naked claim for damages generally, on account of the breach, to be obtained through an action at law, attended by all the incidents of a like action on behalf of one who is not the beneficiary of a trust."

And:

"Our conclusion is that the plaintiffs, upon the facts as disclosed by the record, had only a claim against the estate of Griffith, upon which they could have recovered had the same been presented to the defendant as required by the act concerning the settlement of estates of deceased persons, but that they are not entitled to the relief

which they obtained in the court below."

Lathrop v. Bampton, 31 Cal. 17, 23, 24;

This case has frequently been cited with approval, viz, in

Falkner v. Hendy, 107 Cal., 54; 40 Pac. 21;

Orcutt v. Gould, 117 Cal., 316; 49 Pac. 188;

Ellison v. Moses, 95 Ala.. 228; 11 So. 347;

Newberry v. Wilkinson, 190 Fed. 67; s. c. 199 Fed. 682 (9 C. C. A.);

and other cases cited in the notes to California reports under said case in 31 Cal. 17.

See also Burke v. Maguire, 154 Cal. 469; 98 Pac. 21.

Again, in 1884, the supreme court of California in a case exhibiting the following facts:

> "The plaintiff, while a minor, was under the guardianship of Emily E. Hersperger, who died intestate. The defendant Winn was appointed administrator of her estate in 1877. The plaintiff reached majority in September, 1881. This action was for an accounting as to a fund held by the decedent as a guardian, and was commenced in June, 1883. No presentation of the claim was ever made to the administrator. A nonsuit was granted."

The court held:

> "We think the motion for a non-suit was properly granted. The claim on which the action is based was never presented for allowance to the defendant as the administrator of the estate of Mrs. Hersperger, deceased."

Gillespie v. Winn, 65 Cal. 429.

In the annotation to said Cal. C. C. P., § 1493, in 3 Kerr's Cyc. Codes, Cal., on page 1955, appear the following:

"65 Where demand against deceased is for money received by him and commingled with his own so that no funds come to executor bearing earmarks of creditor's property, presentation of claim is required, and executor cannot pay such demand until it be so presented, and claim allowed and payment authorized by court. The executor owes no duty to beneficiaries of trust to keep money invested, and he cannot pay until authorized. The estate is simply indebted in amount, and, under such circumstances, compound interest cannot be charged beyond time of decedent's death.—Bemmerly vs. Woodward, 124 Cal. 568, 574, 57 Pac. Rep. 561."

"66. If deceased was in possession of trust fund, which in mutations of business had become so mingled and absorbed into property belonging to trustee as to be no longer capable of being traced or identified, only remedy of *cestui que trust* against administrator or estate of trustee would be that of creditor, and if he failed to present his claim as required by probate law, he must fail in an action against administrator, but if trust property can still be earmarked or traced and identified *cestui que trust* may maintain his action against administrator to enforce trust, for he is seeking his own property; not to enforce claim against estate and property of decedent.—Roach vs. Caraffa, 85 Cal. 436, 443, 25 Pac. Rep. 22. See Lathrop vs. Bampton, 31 Cal. 17; Sharpstein vs. Friedlander, 54 Cal. 58; Estate of Allgier, 65 Cal. 228, 3 Pac. Rep. 849."

"67. Where one executor who is also legatee dies pending administration, having certain amount of money in his hands belonging to estate, for which no claim was presented against estate of deceased executor within time limited therefor, court has no power to deduct same from legacy to deceased's executor and distribute it to estate. It was duty of surviving executor to have presented claim, or to have compelled accounting. Deceased executor held money in trust for estate and its position upon his death became no better than that of any other creditor unless such estate was able to pursue precise trust fund.—Estate of Smith, 108 Cal. 115, 122, 40 Pac. Rep. 1037.

See Lathrop vs. Bampton, 31 Cal. 17, 23; Choquette vs. Ortet, 60 Cal. 594; Roach vs. Caraffa, 85 Cal. 436, 444, 25 Pac. Rep. 22; Estate of Alliger, 65 Cal. 228, 230, 3 Pac. Rep. 849."

In Orcutt v. Gould, 117 Cal. 316, 49 Pac. 188, the syllabus reads:

"An action will not lie against an executor to have a trust declared against his testator's property for money received by the testator, where the trust fund cannot be identified by showing a separate and independent fund or value readily distinguishable from all other funds; the proper remedy being the presentation of plaintiff's claim to the executor, and suit thereon if rejected."

The court says:

"Upon the facts disclosed by the record, the relief sought cannot be secured. Conceding the existence of a trust, plaintiff's remedy was the presentation of her claim to the executor, and suit thereon if rejected. McGrath v. Carroll, 110

Cal. 79, 42 Pac. 466. The law upon this question of trusts, as involving facts similar to those here disclosed, was laid down in Lathrop v. Bampton, 31 Cal. 17, and as there laid down, has been approved and affirmed to the present time. McGrath v. Carroll, *supra;* Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536. The present action is one to enforce a trust, and, as said in Lathrop v. Bampton, before the *cestui que trust* can claim specific real or personal property, "he must show that it is the identical property originally covered by the trust, or that it is the fruit or product thereeof in a new form." To justify a recovery, a beneficiary must be able to follow and identify the property, either in its original or substituted form. In speaking of a money trust fund, the court, in the above case, said: "The identity of a trust fund consisting of money may be preserved, so long as it can be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value readily distinguishable from all other funds." In that case the deceased left certain money in addition to other personal property and real estate, and the court held that the money left by deceased could not be impressed with the trust, as the evidence failed to show that it was any part of the trust fund."

In McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466 (1895) the syllabus reads:

"One who claims to be a beneficiary of funds received by a decedent as trustee must present his demand against the estate for allowance, like other claims, unless the identical trust property, or its product in a new form, can be traced into

the possession of the personal representatives."

This latter case was affirmed in Grubb v. Chase, 158 Cal. 352, 111 Pac. 91, the court saying:

> "The very gist of plaintiff's action was the alleged fraud perpetrated upon him by Foster. Such fraud must be alleged and proved, and, in order that an action may be maintained against the administrator of an estate, a claim of this kind must be fully presented according to law. McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466."

Lathrop v. Bampton, *supra,* and McGrath v. Carroll, *supra,* are cited with approval, along with other cases, in Newberry v. Wilkinson, 190 Fed. 67 and same case (9 C. C. A.), 199 Fed. 682.

In Ellison v. Moses, 95 Ala. 228, 11 So. 349, where Lathrop v. Bampton, *supra,* is cited and quoted with approval, the following is said:

> "The rule is well settled that the *cestui que trust* is entitled to have the trust visited upon any property into which the trust funds have been invested by the trustee in breach of his duty, or by any third person with notice of the trust, so long as such funds can be satisfactorily traced and identified. But in case of a mere money trust, when the money has been mingled with the funds of the trustee or of another person, so that it cannot be distinguished and identified, and cannot be traced into any particular property, there is no longer any specific thing upon which the trust may attach; and in such case nothing is left to the *cestui que trust* but the moneyed liability in his favor of the trustee or of the third

person who has used the fund with notice of its trust character, and such liability stands upon the same footing as a mere debt, and the *cestui que trust* has no advantage over a general creditor, Parker v. Jones, 67 Ala. 234; Goldsmith v. Stetson, 30 Ala. 164; Stewart v. Fry, 3 Ala. 573; Maury v. Mason, 8 Port. 211; *Indeed, the trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt.* Vernon v. Vawdry, 2 Atk. 119; Benbury v. Benbury, 2 Dev. & B. Eq. 235; 2 Pom. Eq. Jur. § 1080; 2 Lewin Trusts (Flint's Ed) * 906."

[Brown's Estate v. Stair, 136 Pac. 1007]

The authorities cited fully sustain the designation of such a claim as a "simple contract equitable debt." Thus in 3 Pomeroy Equity Jurisprudence (3rd. Ed.), § 1080, it is said:

"It has already been shown that a beneficiary may always claim and reach the trust property through all its changes of form while in the hand of the trustee, and that he may also follow it into the possession and apparent ownership of third persons, until it has been transferred to a *bona fide* purchaser for valuable consideration and without notice; and that a court of equity will furnish him with all the incidental remedies necessary to enforce his claim and to render it effective. In addition to this claim of the beneficiary upon the trust estate as long as it exists, the trustee incurs a personal liability for a breach of trust by way of compensation or indemnification, which the beneficiary may enforce at his election, and which becomes his only remedy whenever the trust property has been lost or put

beyond his reach by the trustee's wrongful act. *The trustee's personal liability to make compensation for the loss occasioned by a breach of trust is a simple contract equitable debt.* It may be enforced by a suit in equity against the trustee himself, or against his estate after his death, and the statute of limitations will not be admitted as a defense unless the statutory language is express and mandatory upon the court. The amount of the liability is always sufficient for the complete indemnification and compensation of the beneficiary."

And the footnote thereto reads:

"Vernon v. Vawdry, 2 Atk. 119. Adey v. Arnold, 2 De Gex, M. & G. 432; Lockhart v. Reilly, 1 De Gex & J. 464; Obee v. Bishop, 1 De Gex, F. & J. 137; Ex parte Blencowe, L. R. 1 Ch. 393; Holland v. Holland, L. R. 4 Ch. 49; Wynch v. Grant, 2 Drew. 312; Benbury v. Benbury, 2 Dev. & B. Eq. 235, 236; (Little v. Chadwick, 151 Mass. 109). The distinction between specialty debts and simple contract debts in the settlement of estates being generally abolished in this country, the liability of the trustee may properly be described as an equitable contract liability or debt,—that is, an equitable liability of the same nature as that arising from breach of contract."

And in 2 Lewin on Trusts, 906, it is said:

"Breach of trust constitutes simple contract debt unless the trustee has covenanted. The claim of the *cestui que trust* is in general a *simple contract debt.*"

In Little v. Chadwick, 151 Mass. 110, the court says:

"When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own; and in such case the *cestui que trust* can only come in and share with the general creditors. *Johnson v. Ames*, 11 Pick. 173, 181, 182. *Le Breton v. Pierce*, 2 Allen, 8, 13. *Andrews v. Bank of Cape Ann*, 3 Allen, 313. *Harlow v. Deshon*, 111 Mass. 195, 198, 199. *Bresnihan v. Sheehan*, 125 Mass. 11. *White v. Chapin*, 134 Mass. 230. *Howard* v. *Fay*, 138 Mass. 104. *Attorney General v. Brigham*, 142 Mass. 248. *Trecothick v. Austin*, 4 Mason, 16, 29. *Ferris v. Van Vechten*, 73 N. Y. 113. *Frith v. Cartland*, 2 Hem. & M. 417. *Isaacson v. Harwood*, L. R. 3 Ch. 225. *Holland v. Holland*, L. R. 4 Ch. 449. Perry on Trusts, §§ 345, 836-842. 2 Story, Eq. Jur. § 1258, 1259. Lewin on Trusts, (8th ed.), 241, 892."

And in Nichols v. Shearon, 4 S. W. 169, which is also cited with approval in 190 Fed. 671, the court says:

"The administrator seems to have acted upon the idea that the debts were incurred in a fiduciary capacity, and that this dispensed with the necessity of their being regularly probated.

Shearon was a trustee for his wards as long as he lived. But, when he died, his indebtedness to the trust became a simple demand against his estate, which required to be sworn to, to be presented to the administrator within two years from the date of his letters, to be allowed, classified, and paid like any other debt he owed. *Hill v. State*, 23 Ark. 604; *Connelly v. Weatherly*, 33 Ark. 658; *Patterson v. McCann*, 39 *Ark.* 577; *Purcelly v. Carter*, 45 Ark. 299; *Padgett v. State*, Id. 495."

And in Attorney General v. Brigham, Ex'r, and others, 142 Mass. 248, 7 N. E. 852, the court says:

"Mr. Justice Story states the rule of law with great clearness. He says:

'Executors are charged with no more in virtue of their office than the administration of the assets of the testator. If, at the time of his death, there is any specific personal property in his hands, belonging to others, which he holds in trust or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, stocks, or other things, is not assets to be applied in payment of his debts, or to be distributed among his heirs, but is to be held by the executor as the testator himself held it. But if the testator has money or other property in his hands belonging to others, whether in trust or otherwise, and it has no earmark, and is not distinguishable from the mass of his own property, the party must come in as a general creditor, and it falls within the description of assets of the testator.' *Trecothick v. Austin*, 4 Mason, 16.

"This rule has been adopted and recognized in several cases by this court. *Johnson v. Ames*, 11 Pick. 173; *Harlow v. Deshon*, 111 Mass. 195; *Burgess v. Keyes*, 108 Mass. 43."

By Revised Codes, § 7760, a guardian is required to give a bond, which it is alleged was done in the instant case, wherein *inter alia*, he obligates himself, i. e. covenants or contracts, to account for, and return all unused funds coming into his hands. If he fails in this, there is a breach of the obligation of the bond, a breach of the trust, and a claim because of this breach is one "arising upon contract", and is clearly, we submit, both within the letter and spirit of the Montana Non-Claim statutes. The precise point has not been, so far as we are aware, passed on by the Montana Supreme Court, but in view of the foregoing principles, and particularly in view of the California decisions, above cited, we have no doubt that that court would align itself with that of California.

That these statutes are mandatory and must be complied with and an allegation of presentation, rejection, and of course proof thereof, is indispensable; see:

Dorais v. Doll, 33 Mont. 316.
Milton v. Jones, 28 Mont. 150.

Another well considered and controlling authority on this court is that of Morgan v. Hamlet, 113 U. S. 449. That, too, was a claim or demand arising out of a trust relation, wherein the trustee was charged with

failure to account for, and conversion of trust funds, and the Arkansas statute was held to constitute a bar, the syllabus reading:

> "That statute of Arkansas that 'All demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred' begins on the granting of letters of adminstiration, to run against persons under age, out of the state with no guardian appointed within the state, and whose claims are alleged to be founded in frauds which were not discovered until after the expiration of the two years fixed by the act."

This case has been repeatedly affirmed and followed both in the Circuit Courts and in the Supreme Court, the latest decision in the latter court being that of Security Trust Co. v. Black River Nat'l Bank, 187 U. S. 211, which holds that statutes like those under consideration, "are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights." (Page 229):

Citing also Yonley v. Lavender, 21 Wall. 276, and numerous Circuit Court decisions.

See, also:

Green v. Barrett, 123 Fed. 349.

Schurmeier v. Conn. Mut. Life Ins. Co., 124 Fed. 865.

Newberry v. Wilkinson, 190 Fed. 62, S. C. 199 Fed. 673, Nos. 1, 2.

Judge Woerner in his work, 2 American Law of Administration, § 368, states the rule in accordance with the foregoing authorities, thus, he says:

> "Money held or owing by an executor, administrator, guardian, or other person sustaining a fiduciary relation at the time of his death, constitutes, in so far as such money or other property cannot be specifically traced and segregated from the decedent's own money and property, a debt."

And in § 402 of the same work, he says:

> "The statute of Non-claim or of limitation specially to estates of deceased persons, is in most states applied more rigorously than the general statute of limitations; the administrator cannot waive it, and it has been held that the temporary absence of the executor from the state does not interrupt its course. * * * * * As between a *cestui que trust* and his trustee the statute of limitations does not usually apply; and where a trustee dies, the trust fund, if traceable in specie, constitutes no part of his estate, and is recoverable from the administrator by the successor in the trust, or person entitled to the fund, without any of the formalities prescribed for the establishment of a claim against the estate, but when such trust fund is confused with the trustee's own property, so that its identity is lost, the *cestui que trust* or new trustee, as the case may be, stands in the position of a general creditor, to whom the statute of Non-claim applies with equal rigor as against other creditors."

That the legislature of Montana, did not intend to distinguish between claims *ex contractu and ex*

delicto is clearly apparent from the terms of Rev. Codes, § 7534, which reads:

> "7534. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases, and no recovery shall be had in the action unless proof be made of the presentations required."

The attempted excuse for this failure to present the claim and to comply with the statutes in the present instance, i. e., because of temporary absences of the executrix from the state, is wholly insufficient, for the reason that inasmuch as the statutes make no exceptions, the courts are powerless so to do. The only exception the statute makes is want of notice of the publication on the part of the claimant by reason of his being out of the state. The rule *expressio unius est exclusio alterius* is applicable.

> Savings, etc., Co. v. Bear, etc., Co., 89 Fed. 32, 40.
>
> Douglass v. Folsom, 33 Pac. 662.
>
> Roddan v. Doane, 92 Cal. 556, 28 Pac. 604.

And so as to a similar attempt to escape the statute, the United States Supreme Court, in Morgan v. Hamlet, 113 U. S. 452, says:

> "The statute in question contains no exception in favor of claimants under disability of nonage, or otherwise; the claim of the complainants against John G. Morgan was adverse to his administration, although it may have originated in

consequence of a relation of trust; and there is no ground, that we are able to understand, on which it can be excepted out of the operation of the statute in question. Their claim was equally against the administrator of John G. Morgan, whether the latter be considered as the defaulting partner of themselves or of their father. Whatever its description, it was a claim against the estate of John G. Morgan, and for which his personal representative was in the first instance liable; and the statute is a bar to every such claim, unless presented within the time prescribed."

And so, too, in effect, is Milton v. Jones, 28 Montana 150, where the syllabus is:

"Under the direct provisions of the Code of Civil Procedure, § 2603 (Rev. Codes, § 7525), all claims against the estate of a decedent must be presented within the time limited in the administrator's notice to creditors, or they are barred forever, except when it appears by the affidavit of the claimant, to the satisfaction of the court, that he had no notice, by reason of being out of the state."

And even if the executrix had been absent from the state, still the notice, as § 7522 requires, designated a place for the transaction of the business of the estate, and a presentation there and even a rejection by the attorney of the estate, would have sufficed as a compliance with § 7525, as is held in

Dorais v. Doll, 33 Mont., 314.

Douglass v. Folsom, 33 Pac. 662.

Roddan v. Doane, 92 Cal. 556, 28 Pac. 604.

Surely the claim of complainant could just as well have been presented at the designated place, during the absence of the executrix, in the ten months after December 18th, 1908, as the bill of complaint shows it was presented in the present instance on March 14, 1913.

The courts are powerless to relieve one from the consequences of a failure to present a claim against an estate as the statute requires.

> "Having omitted to do so, he has in effect waived his demand against the estate."
>
> In re Hincheon's Estate, 159 Cal., 755, 116 Pac. 47, 49.

II.

STATUTE OF LIMITATIONS.

The present action was begun May 17, 1913. The appellee attained his majority October 10, 1906, more than six years prior to the suit. John M. Smith died October 6, 1908. Letters testamentary were issued on his estate November 7, 1908. In his testimony in the state court appellee stated that he first learned of the facts which he claims entitled him to relief in the spring of 1907 (Transcript, p. 66). He now endeavors to show that by the term spring he meant sometime during the month of August, 1907, prior to the 15th (Id.). In either event, a period of more than five years and nine months elapsed between

said alleged discovery and the commencement of the suit. What statute of limitations is applicable? Clearly, we submit, Rev. Codes, § 6449, sub. 4, which reads: (Within two years)

> "4. An action for relief on the ground of fraud or mistake, the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

To avoid the plain terms of this statute, appellee's counsel seek to avail themselves of the provisions of Rev. Codes, § 6458, viz:

> "*Exception, where defendant is out of the state.*—If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action,"

in that they aver consecutive absences from the state both of John M. Smith and of the defendant executrix. But said section is an exception only in so far as the defendant himself is concerned, and it has no application to any absence of the executrix, for as is said by the Supreme Court of Montana in 40 Mont. 569:

> "Section 9028, above, is a general statute of limitations, applicable to misdemeanors; and it is an elementary rule of statutory construction that an exception to such a statute cannot be

enlarged beyond what its plain language imports, and that, whenever the exception is invoked, the case made must clearly and unequivocally fall within it. (Wood on Limitations, 3d ed., sec. 252, and note.) The author just cited, after a very thorough review of the authorities, says: 'It may be safely said that the courts have no authority to make any exceptions in favor of the party, to protect him from the consequences of the statute, unless they come clearly within the letter of the saving clauses therein contained, and that the exercise of any such authority by the courts is a usurpation of legislative powers by it which is wholly unwarranted, and which courts should never resort to. By making the exceptions which exist in the statute the legislature has exercised its prerogative power, and the fact that no others were made clearly indicates that it intended that no others should exist, and the courts have no power to add any, however much the ends of justice in a particular case may demand it."

True, the Montana supreme court was applying the rule to a criminal statute, but the quoted and approved passage from Wood on Limitations, and indeed the entire scope of the decision, apply to all statutes of limitations. In addition to the text from Wood quoted in the above opinion, we also quote from the footnote thereto, viz:

"The appellant contends that when exceptions are provided to a general statute it excludes all others than those expressed, and that courts are not at liberty to ingraft other exceptions than those expressed, upon such a statute.

> This claim finds strong support in the following cases cited by counsel: Chemical Nat. Bank v. Kissanne, 32 Fed. Rep. 429; Engel v. Fischer, 102 N. Y. 400, 3 Cent. Rep. 303; Fee v. Fee, 10 Ohio, 470; Amy v. Watertown, 130 U. S. 320, 22 Fed. Rep. 418; Alabama Bank v. Dalton, 9 How. (U. S.) 526; Kendall v. United States 107 U. S. 123; Favorite v. Booher, 17 Ohio St. 548; Woodbury v. Shackleford, 19 Wis. 55; Somerset Co. v. Veghte, 44 N. J. 509; Demarest v. Wynkoop, 3 Johns. Ch. 129; Miles v. Berry, 1 Hill, L. 296; Troup v. Smith, 20 Johns, 33. These questions were presented and passed upon in a number of those cases, holding that the general statute excludes all others, and that when the legislature has made exceptions the courts can make none. Campbell v. Long, 20 Iowa, 382; Shorick v. Bruce, 21 Iowa, 307; Relf v. Eberly, 23 Iowa, 469; Gebhard v. Sattler, 40 Iowa, 152; Miller v. Lesser, 71 Iowa, 147."

The rule that exceptions to the statute of limitations are to be strictly construed, and that implied and equitable exceptions are not to be engrafted on the statute, where the legislature has not made the exceptions in express words, is very clearly set forth in Lawson v. Tripp, 95 Pac. 520, 522, where the court said:

> "While the general rule is that statutes of limitation generally are to be liberally construed, it is also a well-recognized doctrine that, when such statutes contain provisions excepting certain persons or classes from the operation of the statutes, those exceptions are to be strictly construed. And courts will not by construction ex-

tend the exception so as to include persons not expressly mentioned therein. Black, in his work on Interpretation of Laws, p. 332, referring to statutes of limitation, says: 'But if the statute itself is to be construed liberally, necessarily it follows that the exceptions which it makes in favor of particular persons or classes are to be construed with strictness. Accordingly the doctrine is now very fully established that implied and equitable exceptions are not to be ingrafted upon the statute of limitations where the legislature has not made the exception in express words in the statute; the courts cannot allow them on the ground that they are within the reason or equity of the statute.' In McIver v. Ragan, 2 Wheat. 24, 4 L. Ed. 175, the Supreme Court of the United States, speaking through Chief Justice Marshall, says: 'Wherever the situation of a party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the exception. It would be going far for this court to add to those exceptions. It is admitted that the case of the plaintiff is not within them, but it is contended to be within the same equity with those which have been taken out of the statute.' The court then refers to the difficulties to plaintiff and parties similarly situated because of the strict construction placed on the statute by the trial court, and says: 'If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not contain.' 25 Cyc. 990; Allen v. Mille, 17 Wend.

(N. Y.) 202; Bedell v. Janney, 9 Ill. 193; Favorite v. Booher's Adm'r, 17 Ohio St. 548; Dozier v. Ellis, 28 Miss. 730; Sacia v. DeGraaf, 1 Cow. (N. Y.) 356; Amy v. City (C. C.) 22 Fed. 418; Pryor v. Ryburn, 16 Ark. 671; Buswell, Lim. & Adv. Poss. 16."

See also Norris v. Haggin (Judge Sawyer), 28 Fed. 275, 282, and Amy v. City of Watertown, 22 Fed. 418, which was affirmed in 130 U. S. 320, 326, where the Supreme Court on this point says:

"Inability to serve process on a defendant has never been deemed an excuse for not commencing an action within the prescribed period. The statute of James made no exception to its own operation in case where the defendant departed out of the realm, and could not be served with process. Hence the courts held that absence from the realm did not prevent the statute from running. Wilkinson on Limitation, 40; *Hall v. Wyborn* 1 Shower, 98. This difficulty was remedied by the act of 4 and 5 Anne, c. 16, § 19, which declares that if any person against whom there shall be any cause of action be at the time such action accrued beyond the seas, the action may be brought against him after his return, within the time limited for bringing such actions. Most of the states have similar acts. The statute of Wisconsin, as we have seen, has a similar provision; perhaps wider in its scope. That statute, therefore, has expressly provided for the case of inability to serve process occasioned by the defendant's absence from the state. It has provided for no other case of inability to make service. If this is an omission, the courts cannot sup-

> ply it. That is for the legislature to do. Mere effort on the part of the defendant to evade service surely cannot be a valid answer to the statutory bar. The plaintiff must sue out his process and take those steps which the law provides for commencing an action and keeping it alive."

We have seen that absence of the executor, or administrator, from the state, does not preclude or excuse the presentation of a claim against the estate; that 10 days non-action thereon is to be regarded as a rejection; and that suit thereafter must be brought within three months, or be forever barred (Rev. Codes, § 7530); there appears, then, no reason why the claim could not have been presented, prior to November, 1909, even though the executrix was without the state, after the notice to creditors, on December 18, 1908, and a suit, at least, have been begun within the statutory three months after the rejection, and personal service of process thereon could have been had during the five months of May, June, July, August and September of 1909, when she was confessedly within the state (See Stipulation, Transcript, p. 62), and subject to personal service of process, or for that matter, such service could have been had at any time during her presence within the state. Her absence from the state did not deprive the plaintiff of a remedy, for in addition to her presence within the state during the periods mentioned, this being an equitable action, if personal service had been impossible, which clearly it was not, an order of court for constructive service

could have been obtained, in that the plaintiff's claim is against property confessedly within the district. Upon this point the doctrine of Seculovich v. Morton, 36 Pac. 387, is applicable, viz:

> "The defendant's absence from the state did not deprive the plaintiff of a remedy. He might have invoked the authority of the court, and, upon service of process in the manner prescribed by the statute, could have procured the appointment of a commissioner to convey the property to him. Perkins v. Wakeham, 86 Cal. 580, 25 Pac. 51; Applegate v. Mining Co., 117 U. S. 266, 6 Sup. Ct. 742; Arndt v. Griggs, 134 U. S. 320, 10 Sup. Ct. 557; Adams v. Cowles, 95 Mo. 501, 8 S. W. 711; Felch v. Hooper, 119 Mass. 52."

It is conceded that five months of the statute had run prior to the death of John M. Smith, and that the statute had begun to run again on November 8, 1909, but that was more than three years and six months, or with said five months, more than three years and eleven months, whereas the statute unquestionably applicable limits such an action to two years. See Lataillade v. Orena, 27 Pac. 924, in which the prototype of Rev. Codes, § 6449 sub. 4, under substantially similar facts is construed.

Again, an executrix may not be identified with the defendant referred to in said § 6458, for as it is said in Ward v. Magaha, 129 Pac. 397:

> "The general rule is that *an executor is a trustee for the heirs, and in no sense stands in the shoes of the deceased, that he is bound by the*

statute, and cannot waive as against the heirs or devisees any requirement of the statute. 18 Cyc. 500; 11 A. & E. Enc. Law, 924; Cockrell v. Seasongood (Miss.), 33 South. 77; Fitzgerald v. Nat. Bank, 64 Neb. 260, 89 N. W. 813 (syllabus); Winchell v. Sanger, 73 Conn. 399, 47 Atl. 706, 66 L. R. A. 935; Farwell v. Richardson, 10 N. D. 34, 84 N. W. 558; Miller v. Ewing, 68 Ohio St. 176, 67 N. E. 292; Thompson v. Hoxsie, 25 R. I. 377, 55 Atl. 930."

And this, too, is the holding in Montana, for in Vanderpool v. Vanderpool, 138 Pac. 772, 774, the Supreme Court of that state says:

"These statutes of non-claim are special in character; they supersede the general statutes of limitations, and compliance with their requirements is essential to the foundation of any right of action against an estate upon a cause of action which sounds in contract. The executor or administrator is in effect a trustee of the funds of the estate for the benefit of the creditors and heirs, and cannot waive any substantial right which materially affects their interests, and, for the same reason, cannot be estopped by his own conduct. He cannot, by failure to plead the statute of nonclaim as against one who sues upon a claim which has not been properly presented, preclude the heirs or other creditors of the estate from setting it up upon settlement of his accounts (In re Mouillerat's Estate, 14 Mont. 245, 36 Pac. 185), and he renders himself personally liable for devastavit in case of payment of such a claim. While an equitable estoppel might be invoked as against an executor or administrator so far as his

individual interest in the estate is concerned, it cannot operate to the prejudice of the heirs or other creditors. Even his misleading statements, his assurances or his conduct which induces a creditor to omit compliance with the statute, will not operate to estop him from contesting the claim upon the ground of noncompliance. The reason for these rules ought to be manifest at once, and with reference to them there is substantial unanimity of opinion among the authorities. 2 Woerner's American Law of Administration, § 387; Kells v. Lewis, 91 Iowa, 128, 58 N. W. 1074; Spaulding v. Suss, 4 Mo. App. 541.

When the various provisions of the Montana statutes relating to claims against an estate and the limitations thereto are considered it will be readily seen that the exception in § 6458 has no application to executors. Thus in Rev. Codes, § 6460, it is provided:

> "If a person against whom an action may be brought, dies before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

And in § 6461:

> "*Where person dies out of state.*—If a person against whom a cause of action exists, dies, without the state, the time which elapses between his death, and the expiration of one year, after the issuing, within the state, of letters testamen-

tary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator."

See also Rev. Codes, § § 7522, 7523, 7525, 7526, 7528, 7530, 7531, 7532, 7533, and 7534.

The statute applies to suits in equity.

Mantle v. Speculator M. Co., 27 Mont., 476;

Wood on Limitations, § 58;

and

"All courts of the United States, in the absence of legislation by Congress on the subject, recognize the statutes of limitations of the several states, and give them the same construction and effect as are given by the local tribunals. They are a rule of decision under § 34 of the Judicial Act of 1879; and, as the construction given to a statute by a state by its highest judicial tribunal is regarded as a part of the statute, and is as binding upon the courts of the United States as the text, new views adopted by such high tribunals as to the construction of such a statute, though reversing its former decisions, are followed by the U. S. Supreme Court. Leffiingwell vs. Warren, 2 Black. (U. S.) 599, 603; Bauserman v. Blunt, 147 U. S. 647, 653; Brady v. Daly, 175 U. S. 148, 158; Balkam v. Woodstock Iron Co., 154 U. S. 177, 189."

Wood on Limitations, note to § 40a on pages 98, 99.

See also Newberry v. Wilkinson, 190 Fed. 62, 199 Fed. 673.

Now John M. Smith died at Battle Creek, Michigan, October 6, 1908. Letters testamentary were issued November 7, 1908. Doubtless his absences from the state subsequent to the accrual of the cause of action, say seven months in 1908, should be deducted, but whether any period should be deducted for 1907, is questionable, for if the accrual of the action was in August, 1907, there could be only some four months in that year and he was present in the state four months as per the stipulation (Transcript, p. 62), and inasmuch as absence of the defendant from the state is exceptional in its character, the four months of his presence here should be presumed to have been after the accrual of the cause of action.

Bass v. Berry, 51 Cal. 265.

But conceding for the sake of argument the four months absence in favor of appellee we have four months in 1907, seven months in 1908, one month between the death and the letters, a total of twelve months, to which should be added the one year after the letters as provided in § 6460; so it would appear then, that the action should have been commenced prior to November 7, 1909, or at any rate long before May 17, 1913.

Despite the views above expressed the learned district judge sought to and has construed Rev. Codes (Mont.) § 6458 as including within its meaning other persons than those therein designated, and yet he admits in his opinion (Transcript, p. 192) "And though

the literal reading of § 6458, *supra,* may support defendant's contention (i. e., that only those persons mentioned in said section are excepted from the general statute of limitations), it must yield to what must be assumed to have been the legislative intent, that is, to suspend limitations whenever absence from the state of the party defendant, be he debtor or personal representative, prevents effective prosecution of a cause of action." Now with all due respect, it is submitted that this view is wholly fallacious. It cannot be disputed that in the construction of its own statutes the views of the Supreme Court of the State of Montana are paramount and binding, and in construing this particular statute (§ 6458) that court has said in State v. Clemens, 40 Mont. 567, 569:

> "It may be safely said that the courts have no authority to make any exceptions in favor of the party, to protect him from the consequences of the statute, *unless they come within the letter of the saving clauses therein contain*ed," etc. (Italics ours).

So when it is admitted, as the excerpt from the aforesaid opinion does, that defendant's (appellant's) contention finds support in the literal reading of the statute, it is clearly contrary to the said decision of the Supreme Court of Montana, to reject such contention and to read into the statute, something, i. e., the words "personal representative" or words of like import, which all rules of construction inhibit, and par-

ticularly Revised Codes of Montana, § 7875, which reads:

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."

Nor is the case helped out by the reference of the lower court to Rev. Codes, § 6214, which reads:

> "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice,"

for here we have nothing to do with the common law, but with a statute, one, too, of which the Supreme Court of the state has said, reading from the syllabus:

> "An exception to a statute of limitations cannot be enlarged beyond what its plain language imports, and, when invoked, the case must clearly and unequivocally fall within it."

State v. Clemens, 40 Mont. 567.

We have seen that the executor of an estate does not stand in the shoes of the decedent, does not represent him, but that he is the representative first of the creditors, and second of the heirs, devisees or legatees of the decedent.

Ward v. Magaha, 129 Pac. 397,

and cases cited;

Vanderpool v. Vanderpool (Mont.), 138 Pac. 772, 774.

It is easily conceivable that the interest of creditors may be hostile to that of decedent and to those deriving property from him either by descent or purchase, so by the construction placed on the exception statute by the lower court not only is there inserted into that statute a person other than the one mentioned therein, but the representative of an entirely distinct and hostile class of persons. Surely this can not logically be said to have been the intent of the legislature in adopting said statute and the *ratio decidendi* of the lower court in that regard is strained and unwarranted. If it is the law, as it certainly is, that an executor cannot waive the statutory requirements concerning claims against the estate of a deceased person; if he cannot estop himself or the estate by misleading statements, assurances or conduct, as is held in Vanderpool v. Vanderpool (Mont.), 138 Pac. 774; if he cannot waive the bar of the statute of limitations, as both he and the judge passing on the claim are by statute prohibited from doing, Rev. Codes, Montana, § 7531, then it must logically follow that he cannot suspend the running of the statute by absenting himself from the state. Nor can it be said, as intimated in the opinion of the lower court, that a claimant against an estate is in such case without remedy, for as we have seen, the Montana decisions are to the effect that

claims against an estate for allowance or rejection may be presented at the place designated in the statutory notice to claimants,

Dorais v. Doll, 33 Mont. 314;
Douglass v. Folsom, 33 Pac. 662;
Roddan v. Doane, 92 Cal. 556, 28 Pac. 604;

And if a suit should become necessary thereon, an order for constructive service might be obtained.

Seculovich v. Morton, 36 Pac. 387,

or, upon application to the court, the absent or derelict executor might be removed and an administrator *cum testamento annexo* be appointed in his stead. Ample authority for this course is provided for by the statutes, Rev. Codes (Mont.), §§ 7488-7492, and by general law, see 1 Woerner Am. Law of Adm. § 270, on page 576.

It would serve no useful purpose to review the authorities cited in support of the views of the district court on this point, all of which we have carefully read, because they are avowedly based upon a construction of statutes peculiar to the respective states whence they emanate, and in none of them was the limitation and rule announced and emphasized in 40 Montana, 567 *supra*, adverted to or considered.

III.

LACHES.

The present case is an action in equity. Now one of the cardinal rules in equity is, as stated in

Kavanaugh v. Flavin, 35 Mont. 137:

> "The plaintiff sought the aid of a court in equity and is bound by the principles applicable to proceedings in equity. It is a familiar maxim that equity aids the vigilant, or, as the same thing is expressed in our Civil Code (section 4618), 'the law helps the vigilant, before those who sleep on their own rights.'
>
> "Good faith and reasonable diligence only can call into activity the powers of a court of equity, and, independently of the period fixed by the statute of limitations, stale demands will not be entertained or relief granted to one who has slept upon his rights. Considerations of public policy and the difficulty of doing justice between the parties are sufficient to warrant a court of equity in refusing to institute an investigation where the lapse of time in the assertion of the claim is such as to show inexcusable neglect on the part of the plaintiff, no matter how apparently just his claim may be; and this is particularly so where the relations of the parties have been materially altered in the meantime."

This is a substantial defense, and it may be raised by a motion to dismiss, by a motion for non-suit, or by a motion for judgment for defendant. It is independent of the statute of limitations, and may be availed of in a far shorter period than is thereby prescribed. If it is apparent, or deducible from the plaintiff's statement of his case, he must allege and prove a good and substantial excuse for his delay. Appellee's counsel evidently saw the infirmity of his case in this regard, and sought to obviate it in the

bill of complaint, at least in part, by stating "that he has not been guilty of any laches in this matter", which is but the statement of a bald conclusion of law, and is consequently wholly insufficient, and by stating "that his failure to present a claim sooner against the estate was due to the fact that he believed that he had a good cause of action to set aside the sale of the property to the said John M. Smith by the executor of the estate of William A. Smith aforesaid; that he did bring a suit for the said purpose within one year after his majority, to-wit, in the month of August, 1907, and that the said suit was pending in the courts of this state until the 14th day of November, 1912; that said suit has been dismissed."

Bill of Complaint, Transcript, p. 14. Further, in said bill of complaint, he states: "As far as his information or understanding went, that any fraud had been committed upon him or upon his sisters, and that he did not discover or learn of the fact until the month of August, 1907."

Bill of Complaint, Transcript, p. 13. In his testimony upon the trial in the state court, which was read to him while he was testifying in the present case, Transcript, pp. 66-67, he said he first learned of the facts in the spring of 1907, at any rate it was prior to August 15, 1907. He attained his majority in October, 1906; he was fully aware of all the facts on and prior to August, 1907; John M. Smith was alive until October 6, 1908; he had ample opportunity to

bring an action, similar to the present one during the lifetime of defendant's testator, yet he refrained from so doing and further delayed action until more than four years and seven months after the death of the participant and most important witness. The authorities are as one in condemnation of delay under such circumstances. Thus in Mackall v. Casilear, 137 U. S., 566, the court said:

> "The doctrine of laches is based upon grounds of public policy, which require for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence. *Jenkins v. Pye,* 12 Pet. 241; *McKnight v. Taylor,* 1 How. 161, 168; *Godden v. Kimmell,* 99 U. S. 201; *Landsdale v. Smith,* 106 U. S. 391; *Le Gendre v. Byrnes,* 44 N. J. Eq. 372; *Wilkinson v. Sherman,* 45 N. J. Eq. 413.
>
> "The time for this son to have attacked his father on the ground of fraud was prior to that father's death; yet no movement was made to set aside these alleged fraudulent conveyances, until five years after that event transpired."

And in Kavanaugh v. Flavin, 35 Mont., 138, the following citation from the Supreme Court of the United States is approvingly made:

> "Speaking upon the subject of laches, the

supreme court of the United States, in *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134, said: 'No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like. (*Marsh v. Whitmore*, 88 U. S. (21 Wall.) 178, 22 L. Ed. 482; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. 942, 34 L. Ed. 424; *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. 178, 34 L. Ed. 776; *Hanner v. Moulton*, 138 U. S. 486, 11 Sup. Ct. 408, 34 L. Ed. 1032.)' "

The excuse here offered is wholly insufficient in that it simply amounts to an allegation that he was ignorant of the law, as applied by the courts of the state, to the facts and statutes of the state which were involved in his said first suit. Ignorance of the law excuses no one. Indeed, we submit, that it is apparent that only after his defeat in an attempt to secure a much larger portion of the defendant's estate, was the present action conceived. It is further apparent that if the action had been instituted during the lifetime of defendant's testator and even if he had succeeded in sustaining it a far less sum in the form of interest would have been recoverable. Even in actions at law it is the rule in the federal courts to withhold interest, if there has been any long delay in the assertion of a claim. See:

Redfield v. Ystalyfera, etc., Co., 110 U. S. 174.
United States v. Sanborn, 135 U. S. 271;
Redfield v. Bartels, 139 U. S. 702;

which cases have frequently been applied in the various courts. See note 3 Digest U. S. Supreme Ct. Reports, Title Interest, No's 80, 81.

IV.

PLEA OF FORMER ADJUDICATION.

The appellant contends that the subject matter of the present suit has already been determined by a former adjudication between the same parties.

In paragraph 9 of the answer, appellant pleads the judgment of the District Court of the Tenth Judicial District of the State of Montana, duly made and given on the 15th day of September, 1911, against the appellee and in favor of the appellant herein; that said judgment of said court, was, on the 10th day of June, 1912, on an appeal taken by the appellee herein, duly affirmed by the Supreme Court of Montana; that on the 14th day of November, 1912, a petition for rehearing, filed by appellee herein, was by said court overruled and denied; and that by said judgment of said District Court, by the decision of the Supreme Court of the State of Montana, rendered on the appeal from said judgment, all matters and things and causes of action set out in the bill of complaint herein were determined in favor of this appellant and against the appellee herein.

The general principles which control when a former judgment is pleaded as an estoppel have often been announced by the Supreme Court of the United States.

In New Orleans vs. Citizens Bank, 167 U. S. 371, 396, the court says:

> "In Cromwell vs. Sac County, 94 U. S. 351, 353, after a full statement of the nature of the estoppel resulting from the thing adjudged where the demand was the same in both cases, the court then considered the extent of the estoppel where the causes of action were distinct and said: 'But where the second action between the same parties

is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.' "

Again, in the case of Southern Pacific R. Co. vs. United States, 168 U. S., 48-49, the court said:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, unless so determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established which is to secure the peace and repose of society by the settlement of matters capable of judicial jurisdiction. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked

for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Again, in Troxell v. Delaware L. & W. R. Company, 227 U. S., 440, the court says:

"Where the second suit is upon the same cause of action set up in the first, an estoppel by judgment arises in respect to every matter offered or received in evidence, or which might have been offered, to sustain or defeat the claim in controversy; but, where the second suit is upon a different claim or demand the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit."

In the instant case the question then is, what matters were in issue or what points controverted and actually determined in the original suit in the state court between the parties to this action.

Counsel for appellee, on the hearing before this court, declared that the purpose of this present suit was to have reopened the final account of John M. Smith, as guardian for the complainant, filed in the District Court of Meagher County, State of Montana, on December 11th, 1906, and approved by said court shortly thereafter, and also to recover interest on all moneys of the appellee used by John M. Smith, as guardian. And it is of moment to determine whether or not the validity of the order of the District Court of said

County of Meagher, made on the 11th day of December, 1900, allowing John M. Smith to borrow and use the guardianship funds in his hands; and whether or not the order of said court approving the final account of John M. Smith, as guardian of appellee, and discharging him as guardian were not held and declared to be valid orders by the judgments of both the District Court and the Supreme Court of the state of Montana, above referred to.

With reference to the order of December 11, 1900, it appears from finding of fact No. 54, page 48, of the record on appeal in the case of Smith vs. Smith:

> "That on or about June, 1899, J. M. Smith spoke with Judge Armstrong about using the guardianship moneys at four per cent." (Transcript, p. 110.)

And from finding No. 56, pages 48-49, of said record on appeal:

> "That on December 11th, 1900, the order allowing John M. Smith, the guardian, to use the money in his hands at three per cent interest per annum was made and entered." (Transcript, p. 110.)

And that the question of the validity of said order and the question of appellee's right to charge John M. with interest were presented to the court on the appeal to the Supreme Court of the state of Montana, appears from an examination of pages 24, 25, 43, 71-75, 105-6 and 113, of appellee's brief in that case (Transcript,

p. 171), and from appellee's assignment of error No. 14, page 60, of his brief, which is as follows:

> "It was error in the court not to hold and find, and to decree accordingly, that under any circumstances the defendant, John M. Smith, and his successor in interest, should account to the appellant for the full value of the use of the money of the appellant at the current rates of interest charged by banks during the time that he had the use of such money." (Transcript, p. 172.)

The validity of said order is attacked in express words on pages 43 to 106 of appellee's said brief.

The question of interest is referred to on pages 2, 5, 7, 8, 14, 16, 25, 27, 31 and 32, of appellee's petition for rehearing in said cause (Transcript, pp. 172-173), and the question of the validity of said order of December 11, 1900, is questioned on pages 6, 7, 17, 19, 20, 22, 23, and 24, of said petition for rehearing.

It further appears from an examination of appellee's brief filed in the Supreme Court of the state of Montana, in said cause of Smith vs. Smith, that the decree of final discharge of John M. Smith, as guardian, was urged and sought to be declared to be void and of no effect on pages 124, 125, 126, 127 and 128, of said briefs.

An examination of the brief of the respondent, filed in the Supreme Court of the state of Montana, in said cause, will show that every point and matter

urged herein by the appellee as a reason why said judgment of said District Court should be reversed was contested by respondent (appellant). The court is referred particularly to pages 106, 107, 196, and 197, thereof.

That all the questions now urged by counsel for appellee in this suit were urged by his counsel on said appeal in the case of Smith vs. Smith, and were determined, appears from an examination of the decision of said court in said cause reported on 45 Montana, page 535.

In the first place it is to be noted that the Supreme Court of the state of Montana adopts as its statement of facts the statement of facts from the opinion in the case of Moore vs. Smith, 182 Fed. 540. This statement recites the making of the order on December 11th, 1900, allowing John M. Smith to use the money of the minors (Opinion, p. 563); that John M. Smith, as guardian, settled his final account with plaintiff on the same basis employed on settlement with Nellie Mae Moore, to-wit: Three per cent interest on the principal sum held by him from December 11, 1900. (Opinion, p. 569.)

The court then says:

> "The United States Circuit Court of Appeals decided that the sale of the stock of the estate of the deceased, William A. Smith and the subsequent misappropriation of the money of the minors by their guardian were parts and parcels

of a scheme entered into by and between N. B. and John M. Smith, which was a fraud upon the minors and the Probate (District) Court."

"Judge Hunt who tried the Moore case in the Federal District Court and Judge Stewart who heard this case in the Meagher County District Court were in the opposite opinion; that is to say, in their judgment there was no fraud, collusion or conspiracy and the sale was in all respects legal, regular and free from fraud."

On page 578 of their opinion, the state supreme court says:

> "It is very clear to us (1) that neither John M. Smith nor Napoleon B. Smith ever had any intention or design to defraud the children or to gain any advantage over them. Indeed, in our opinion, all of their correspondence and actions indicate a most praiseworthy solicitude for their material welfare. (2) The property was sold for its full market value and the children suffered no detriment whatsoever on account of the sale. We believe that both John M. Smith and Napoleon B. Smith acted with the utmost good faith in the premises, that they exercised sound judgment as to the affairs of the children, and constantly had in mind the fact that they were dealing with a trust estate and ought not to jeopardize it by taking any chances of its being diminished or lost while in their care. . . . . We do not think that any of the main deductions of fact drawn by the appellant are justified in the evidence."

On page 579, the said court says:

> "We cannot believe that this old man was engaged in a fraudulent conspiracy to defraud his brother's orphan children. Moreover, the facts show they have not been defrauded. Their property was sold to the only purchaser who could be found who was willing to give as much as $85,000.00, the full value thereof; and that sum, after deducting expenses of administration, has been *fully paid them.*"

The statement found on page 579, of said opinion, to-wit:

> "It may be that upon settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time than was actually required of him, but the question is not before us,"

is, in effect, an affirmance of the order of the district court approving the final account of John M. Smith as guardian of complainant; doubtless upon the principle that the order of the District Court approving said account was a final order made by a court having jurisdiction of the subject matter, and so, conclusive upon all whom it concerned in the absence of an appeal therefrom.

Grignons Lessee vs. Astor, 2 How. 338;
State vs. District Court, 34 Mont. 102;
Simmons vs. Saul, 138 U. S., 447, 450, 451, 453-4.

However, as clearly appears from the opinion of the state Supreme Court, the question of addi-

tional interest and the liability of the executrix of the estate of John M. Smith to account therefor, assigned as error by appellant in said suit in paragraph 14, of their assignments of error, appellant's brief, page 69, was directly passed upon adversely to appellant, therein.

On page 580, of its opinion, in said cause, the Supreme Court of the state says:

> "But it is contended that the plan adopted by John M. Smith of using guardianship funds to take up his personal indebtedness to the bank was fraudulent and void as a matter of law. In this connection it may be well to note that aside from the question of the rate of interest that should have been exacted from John M. Smith as guardian, the equities of the case are all with the respondents. The appellant is attempting, in a court of equity, to overturn and set aside a purchase of property sold in good faith, for its full value, every dollar of which has been accounted for, because, as he claims, his guardian used his money for a short time, in order to effect the purchase. In fact, *this consideration is of no moment whatsoever, so far as the result to the appellant is concerned. Not any of his property was embezzled or withheld. All of it was duly and regularly accounted for when he became of age, and turned over to him.* During the latter years of his minority he took no chances of the sheep industry being affected by adverse legislation; he was fully protected from loss; if John M. Smith had continued to pay interest on the amounts temporarily borrowed from the bank and

had allowed the guardianship funds to lie idle, or if he had sold out the entire holdings of the sheep company, as contemplated, the result to the appellant would have been exactly the same as that brought about by the course of procedure actually adopted. If the appellant had been defrauded in fact, or if he had lost anything by reason of the methods pursued by his guardian, he would be in altogether different situation; but such is not the case."

Again, on page 581, of its opinion, the court says:

"Even if we assume that he was not justified in using the funds as he did, and that he thereby technically appropriated them to his own use, yet we must look to the ultimate result of his actions in order to correctly judge of the effect thereof upon the instant controversy. It is impossible for us to believe that a guardian who had given ample security to acount for all funds coming into his hands, who was personally able to raise the amount thereof on demand, who sincerely believed that he was acting legally and for the best interests of his wards, *and who did, in fact, fully account for all moneys paid over to him*, should or could be adjudged guilty of a heinous crime in a subsequent suit by one who has not lost or suffered by his conduct.

"The particular infirmity in the case of the plaintiff is that he is attempting to avoid the sale for a purely technical reason; a reason based in facts arising after the sale was complete, and which had no effect whatsoever upon the sale itself. It is claimed that this may be done because the whole course of action was fraudulent and therefore void; that the subsequent use of his

money, pursuant to a prior design to so employ it, vitiated the sale theretofore made. But his premises are defective. Not any fraud in fact was contemplated or practiced in any part of the proceedings; at most a mistake was made by the guardian as to his right to so use the money; and a technical violation of duty on his part may not now be employed to overturn a transaction otherwise regular and legal, *by which no one had suffered any injury.*"

It is true that respondent in that case contended that the question of the liability of the defendant executrix to account for additional interest was not a matter which could be considered on the appeal to the state Supreme Court, since the theory of the appellant (appellee herein) was that the sale was void, while the claim of additional interest and the liability of the respondent to account therefor proceeded upon the theory of a valid sale. The Supreme Court, however, held that the question of interest was before it and decided that question against appellee, as appears from those portions of the opinion of the court quoted above.

Counsel for appellee so interpreted the opinion of the Supreme Court, as is manifest from a consideration of their petition for a rehearing.

On page 580, of its opinion, the Supreme Court of the state says that the appellee was not defrauded, in fact, and lost nothing by reason of the methods employed by his guardian. Counsel for appellee, on

pages 25-27 of their petition for a rehearing combat this holding of the Supreme Court and contend that John M. Smith by his use of the guardianship funds saved $35,700; and on pages 31-39, of said petition, urged the court to change its holding and direct as alternative relief "an accounting for interest unjustly withheld from him (appellee) upon the settlement" of December, 1906. They say:

> "One of the purposes of the action was to annul the settlement made with appellant and to have the sale adjudged void because of the circumstances and conditions under which the stock was bought and paid for. The court adjudicates, should it grant the alternative relief, that the settlement should be set aside, but that, in view of the circumstances under which the stock was bought and paid for, the further appropriate redress is an accounting for the purchase money and interest from the time the guardian used it, that his use of it entitles the appellant not to overturn the sale but to have interest at a proper rate and for the full period of its use."
>
> Petition for Rehearing, pages 34-35.

Manifestly, the Supreme Court of the state, when it denied appellee's petition for rehearing, held, as it did in its original opinion, that the settlement between John M. Smith and the appellant, complainant and appellee herein, should not be set aside and that he, as alternative relief, was not entitled to an accounting for the purchase money and interest thereon from the time the guardian used it at any rate other than the

rate allowed by the court in its order settling the final account of John M. Smith, as guardian.

On page 38, of said petition, counsel say:

> "Coupled with sanction of a procedure by which the guardian charged himself with interest at three per cent. annually, the lamentable evil of the court's holding, it is impossible adequately to estimate."

When the Supreme Court denied appellee's petition for rehearing, it in effect held that the procedure by which the guardian charged himself with interest at three per cent. was not a "lamentable evil", but, in fact, a just holding under the facts and circumstances and the orders of the District Court made in the premises.

Upon this branch of the case we subimt that every right, question or fact put in issue on this appeal was in issue on the appeal to the state supreme court and was directly determined adversely to the complainant and appellee herein.

V.

THE ORDER OF DECEMBER 11TH, 1900, AND THE ORDER OF FINAL DISCHARGE.

Complainant and appellee, contends that the order of December 11th, 1900, allowing John M. Smith to borrow the guardianship funds and the order approving the final account of the guardian and discharging him are void.

The first order is attacked on the ground of fraud and for want of jurisdiction to make it; the second for want of jurisdiction.

As we have seen, these very questions were presented to the Supreme Court of the state on appeal and there decided against appellee.

But aside from this the orders in question, having been made by a court having jurisdiction of the parties and of the subject matter, can be impeached collaterally only for fraud. And the question of fraud has been forever eliminated from the case by the decision of the State Supreme Court, above referred to, when it said:

> "The appellant is attempting in a court of equity to set aside a purchase of property *sold in good faith*, for its full value, *every dollar of which has been accounted for*, because, as he claims, his guardian used his money for a short time, in order to effect the purchase. In fact this consideration is of no moment whatsoever, so far as the result to the appellant is concerned. *Not any of his property was embezzled or withheld. All of it was duly and regularly accounted for when he became of age, and turned over to him.*" . . . .
>
> "John M. Smith, *as guardian, settled his final account* with the plaintiff on the same basis employed in settlement with Nellie Mae Moore, to-wit, *three per cent interest* on the principal sum held by him from December 11, 1900."
>
> Smith v. Smith, 45 Mont. on pp. 580, 569.

When the court recites in its opinion the basis upon which John M. Smith settled with the plaintiff, appellee herein, and then declares that "all of his property was *duly and regularly accounted* for when he became of age, and turned over to him," we have a direct adjudication that the final settlement was correct; that the order of December 11, 1900, was a valid order and that there was an utter absence of fraud from the whole transaction. If the final account was true and correct and the order approving the same was duly made, as the court must have found was the case in order to hold that John M. Smith "duly and regularly accounted with plaintiff for all the moneys he received" then it is of no moment here that the guardian of complainant received his final discharge before the end of a year from the approval of his final account with complainant.

If the order of final discharge was based upon a mistake of law it can not be collaterally impeached.

Fauntleroy v. Lum, 210 U. S., 230, 237.

In making the order of December 11, 1900, and that approving the final account of the guardian and ordering his discharge, the state District Court had jurisdiction of the subject matter.

Such being the case:

> "The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question and it appears upon

the face of them that the subject matter was within the jurisdiction of the court, they are voidable only. The errors or irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set them aside or in an appellate court."

Thompson v. Tolmie, 2 Pet. 167.

In the case of Grignon's Lessee vs. Astor, 2 How. 319, 340, the court says:

"The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive an all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court, which rendered it, have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction,

they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Pet. 205."

In the case of Cornett vs. William, 20 Wall 226, 240, the court said:

"The settled rule of law is that jurisdiction having attached in the original case everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceedings. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischief would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The county court had the power to make it and did make it. It is presumed to have been properly made, and the question of propriety was not open to examination upon the trial in the Circuit Court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of McNitt v. Turner."

Counsel for appellee, in the lower court, made the point that no notice was given that John M. Smith would apply to the court for permission to borrow the guardianship funds or that on a certain day his final account, as guardian of appellee, would come before the court for its approval.

The question as to the necessity of giving notice in probate proceedings and the effect of want of notice has repeatedly been before the Supreme Court of the United States. In the case of Simmons vs. Saul, 138 U. S., 439, 453, the court, in considering an objection made to an order of sale on the ground that notice of sale was not given, said:

> "But even if it be conceded that the requirements referred to do apply, we are of the opinion that, the jurisdiction over the subject matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court, cannot oust that jurisdiction. They are, at most, errors which could be corrected on appeal, or avoided in a direct action of annulment, as expressly provided in the articles of the code above cited, but cannot be made the grounds on which the decree of the court can be collaterally assailed.
>
> "Our conclusion on this branch of the case is fully borne out by many decisions of the court, two of which are cited above. In McNitt v. Turner, 16 Wall. 366, Mr. Justice Swayne, speaking for the court, said: 'Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, what-

ever errors may subsequently occur in its exercise, the proceedings being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error.' Grignon's Lessee v. Astor, 2 How. 319, 337, 340, 341 was, like this, a case of a sale by an administrator. The court, in its opinion, said: 'The whole merits of the controversy depend on one single question: had the county court of Brown County jurisdiction of the subject on which they acted? . . Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on file, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject matter before the court, and their action upon it, that their judicial power arose and was exercised by a definitive order, sentence or decree. . . . The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. . . . The court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Pet. 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before

them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error.' The following authorities are strong in support of the general proposition under consideration; Thompson v. Tolmie, 2 Pet. 157; Mohr v. Manierre, 101 U. S. 417; Comstock v. Crawford, *supra;* Florentine v. Barton, 2 Wall. 210; Thaw v. Ritchie, 136 U. S. 519."

Brown, in his work on jurisdiction, Second Ed. Sec. 141, page 476, speaking of the notice of sale says:

"The notice, when required, is not a jurisdictional one, nor are the proceedings adversary except in the sense that the statute gives the right to or prescribes the rule for such notice; and in the view of the writer the view laid down by the Supreme Court in Grignon's Lessee v. Astor, 2 How. 338 and constantly adhered to by that high court is correct in principle."

In Elder vs. Mining Company, 7 C. C. A. 354, the court of appeals for the Eighth Circuit said:

"The court had jurisdiction of the parties and the subject matter and it had the power and it was its duty to hear and decide every question of fact and law that arose in the progress of the case, until it was finally disposed of. It was its duty to inquire and decide whether the requirements of the practice act, in the particular mentioned, had been observed. The presumption is that it did so inquire, and that it decided the question rightly, and this presumption is of conclusive force as against a collateral attack upon the judgment. But if this, or any other question of law or fact which arose in the progress of the case,

was erroneously decided, the jurisdiction of the court, and the validity of its judgment would not be affected thereby. An erroneous decision does not divest a court of its jurisdiction over the case. Eliott v. Piersol, 1 Pet. 328, 340. If it commits errors, they can only be corrected by appropriate appellate procedure in a court which, by law, can review the decision. Bronson v. Schulten, 104 U. S. 410. But neither this court nor the circuit court is invested with appellate or supervisory jurisdiction over the state courts, nor can either reverse, vacate, or modify their judgments, in cases in which they had jurisdiction of the parties and the subject matter. Tendall v. Howard, 2 Black, 585; Nougue v. Clapp, 101 U. S. 551; Central Trust Co. v. St. Louis, A. & T. Ry. Co. 40 Fed. Rep. 426. The judgment of June 10, 1882, even if it were erroneous, was not void, and has the same force and effect as if no error had been committed in its rendition."

See also:

Vorhees vs. Bank, 10 Pet. 478;
Manson v. Duncansen, 166 U. S. 547;
U. S. v. Morse, 218 U. S. 508;
Cohen v. Portland Lodge, 152 Fed. 369;
Burton v. Kipp, 30 Mont. 275.

Counsel for appellee, in the course of their argument in the lower court, attacking the validity of the order of December 11, 1900, set out § 7795 of the Revised Codes of Montana empowering the court to order the investment of the funds of the ward. Counsel for respondent, in Smith v. Smith, *supra*, set out

the same statute on pages 106-7 of their brief, and contended that under it the court had authority to make the order complained of. The court in that case must have reached the same conclusion in rendering its decision, as heretofore pointed out.

See In re Schandony's Estate (Cal.), 65 Pac. 877, which case is followed and approved in:

Johnson v. Canty (Cal.), 123 Pac. 263, 265;

Hughes v. Goodale, 26 Mont. 93;

Final Account of John M. Smith in the matter of the Estate and Guardianship of William Smith, minor, Filed Dec. 1, 1906, Recorded in Sales Accts. & Ex. 19 pp. 47-53; Rec. Smith v. Smith, pp. 1333, 1346.

VI.

THE ORDERS SETTLING THE FINAL ACCOUNT OF AND DISCHARGING THE GUARDIAN.

In paragraph IV of the answer the approval and settling of the account of appellant's testator as guardian of the appellee, December 14, 1906, and his discharge, December 27, 1906, are alleged, and certified copies of these orders or judgments of the state District Court were put in evidence. What is the effect of the same? That the state District Court had jurisdiction of the subject matter cannot be questioned.

Revised Codes, § 7792.

Nor can its jurisdiction to render the orders in question, for the rule is, that in a collateral attack upon a judgment, and the present is such an attack:

> "A judgment which is merely voidable is not open to collateral attack.
>
> "A judgment of the district court, having jurisdiction of the subject matter of the action, *unless void on its face or an inspection of the judgment roll, is not open to collateral attack.*
>
> "When a direct attack, other than by appeal, is made upon the judgment of a domestic court of general jurisdiction, the presumption that jurisdiction was had of the defendant obtains, *unless the record affirmatively shows the contrary, or that the defendant was at the time of the service without the territorial limits of the court's jurisdiction.*" Burke v. Interstate, etc., Ass'n, 25 Mont. 315.

And see also

> In re McNeil's Estate, 155 Cal. 333, 100 Pac. 1086.

Such orders are explicitly made appealable in 60 days after rendition. Revised Codes of Montana, Secs. 7098, Sub. 3 and 7099, and if not appealed from, they become conclusive. Revised Codes, § 7649, which by the provisions of Revised Codes, § 7792, is made applicable to the settlement of guardians' accounts. Direct authority for this statement is found in re Dougherty's Estate, 34 Mont. 334, 344; in re Williams' Estate, 146 Cal. 195, 79 Pac. 879.

"A judgment or order of court having jurisdiction is conclusive of all matters involved which might have been disputed at the hearing, although no objection was in fact made. This rule applies to the settling of accounts, the same as to any other proceeding. Estate of Grant, 131 Cal. 426, 63 Pac. 731; Estate of Bell, 142 Cal. 102, 75 Pac. 679."

And, as is said in Newberry v. Wilkinson (9 C. C. A.), 199 Fed. 680:

"The federal courts being governed and controlled by the local laws respecting the administration of estates, their jurisdiction, in so far as it is exercised, is necessarily concurrent with the probate jurisdiction of the several states; and, being concurrent, it follows that the orders and judgments of such probate courts in the due and orderly administration of such estates are conclusive and binding upon the federal courts. This latter deduction has been observed to be the case in the matter of the succession of estates. Johnson v. Waters, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. Ed. 547."

In Botkin v. Kleinschmidt, 21 Mont. 1, the defense was sought to be made by sureties on a guardian's bond, the district court having settled the guardian's account, that in such settlement the court had awarded too much interest, but the court said:

"It is also claimed by appellants that judgment was rendered against Yaeger for too much interest by the District Court. This matter cannot be inquired into now. The judgment of the District Court is conclusive in this action. If the

> judgment was rendered for too great a sum, the parties aggrieved should have sought their remedy in the District Court, and, failing there, should have appealed. No remedy is obtainable in this collateral action."

In the instant case the contention is that too little interest was allowed; that he used the funds for his own use, etc. But, surely in this no fraud can be said to have been practiced. A full statement, as the account shows, was rendered; the borrowing of the money by the guardian at three per cent interest was by reason of the order of court of December 11, 1900; the validity of this order was directly drawn in question in the suit in the state court between the present parties, See Smith v. Smith, 45 Mont. 564, and was considered in the course of the opinion in that case, see 45 Mont. on pages 573, 580, 581, on which latter page the court says:

> "It is claimed that this may be done because the whole course of action was fraudulent and therefore void; that the subsequent use of his money, pursuant to a prior design to so employ it, vitiated the sale theretofore made. But his premises are defective. Not any fraud in fact was contemplated or practiced in any part of the proceedings; at most a mistake was made by the guardian as to his right to so use the money."

And even if it be contended that the order discharging the guardian was prematurely entered under Revised Codes § 3794, still the district court had jurisdiction, and its judgment or order was merely erro-

neous, an error within jurisdiction, correctible either by motion in that court or by direct appeal, and not void, and a bill in equity will not lie to set it aside.

White v. Crow, 110 U. S. 183, 188;

1 Black on Judgments, § 85;

Mitchell v. Aten, 14 Pac. 498;

In re Newman's Estate, 75 Cal. 213; 16 Pac. 889.

Fraud is easily, and frequently rashly asserted, hence it is that it is an unvarying rule that to establish fraud there must be appropriate allegations in the pleadings, and clear and convincing proof to sustain them. We do not dispute that judgments of a court may be impeached for fraud in direct proceedings brought for that purpose, but

> "If the proceeding contemplates more than the setting aside of its final settlement, and the further remedy is sought in the chancery court (as is here the case), all persons having an interest in the estate must be made parties; but if the sole object is to set aside the final settlement, the proceeding should be against the administrator alone."

2 Woerner on Administration, p. 1133, § 508.

To say, in the light of the record in the state court in the present case, and of the decision of the state supreme court affirming it, that any of the orders here referred to were obtained fraudulently, is about as rash a generalization as might be imagined.

Nor is it true, we submit, that the bond given by

John M. Smith as guardian would not cover the money borrowed in the event of a loss thereof.

Section 7760 of the Revised Codes of Montana says that a person appointed guardian must give a bond before his appointment as guardian takes effect and sets out certain conditions "which shall form a part of said bond without being expressed therein," and these conditions are broad enough to cover the moneys borrowed.

VII.

ELECTION OF REMEDIES.

The action brought by the appellee in the state court was to set aside the sale and for an accounting of all the moneys which came into the hands of John M. Smith under it. In other words, the appellee had two remedies available to him, either to affirm the sale and demand judgment for his share of the proceeds thereof, or to set aside the sale and demand his share of the stock of the estate of William A. Smith and all the dividends paid thereon, and the profits flowing therefrom which came into the hands of John M. Smith. Appellee chose the latter remedy and brought his action in the state court, alleging that the sale was fraudulent, and demanded both general and specific relief in the event that the court should set aside the sale.

Appellant contends that having elected to set

aside the sale, appellee cannot now bring this action for relief, based on that ground.

An examination of the records of this court on the accounting had betewen Nellie Mae Moore, as complainant, and the present defendant, as defendant, will show that under the interlocutory decree of this court on said accounting and under the report of the master, made in pursuance thereof, complainant, Nellie Mae More, was awarded interest at eight per cent. on her share of the moneys, the proceeds of said sale which passed into the hands of her guardian, John M. Smith. Appellee was defeated in his action in the state court upon identically the same theory upon which said Nellie Mae Moore recovered, wherein if successful, he would have been awarded the same rights. After having been defeated he brings a new action upon an opposite theory and asks that he may be awarded interest at the same rate upon his share of the moneys of said sale which passed into the hands of his guardian, John M. Smith. It is clear to us that if interest upon these moneys would have been awarded him, in the event that the District Court of Meagher county had held the sale void for fraud, that he is not entitled, in this action, to interest upon the same moneys after the sale has been held to be valid and in all respects free from fraud.

Counsel for appellee seeks to limit this action to one which has for is purpose the setting aside of the

final account between him and John M. Smith, as guardian.

In their petition for rehearing in Smith against Smith, *supra*, said counsel say:

> "One of the purposes of the action was to annul the settlement made with appellant and to have the sale adjudged void because of the circumstances and conditions under which the stock was bought and paid for. . . ." That "the further appropriate redress is an accounting for the purchase money and interest from the time the guardian used it; that his use of it entitled the appellant not to overturn the sale but to have interest at a proper rate and for the full period of its use."

If the action brought by him in the state court entitled appellee to this relief, then when judgment went against him, having made his election of remedies, he could not bring the present action and seek therein the same relief.

> "Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, 'if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election.' Co. Litt. 145a. So a man may ratify or repudiate an unauthorized act done in his name. Metcalf v. Williams, 144 Mass. 452, 454, 11 N. E. 700. He may take the goods or the price when he has been induced by fraud to sell. Dickson v. Patterson, 160 U. S. 584. He may keep in force or

may avoid a contract after the breach of a condition in his favor. Oakes v. Ins. Co. 135 Mass. 248, 249. In all such cases the characteristic fact is that one party has a choice independent of the assent of any one else."

Bierce vs. Hutchins, 205 U. S. 346.

In the case of Robb v. Vos, 155 U. S. 13, the court, in considering the question of election of remedies, says:

"We do not deem it necessary to review numerous cases, involving questions of election of remedy and ratification, cited on behalf of the respective parties, but shall content ourselves with referring to two or three that satisfactorily illustrate the principles upon which we proceed."

In Conrow v. Little, 115 N. Y. 387, 393, 394, the court said:

"The contract between Branscom and the plaintiff was, upon the discovery of Branscom's fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practised by him, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of 'a breach of

contract to pay for goods and money loaned obtained by fraud.' The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one, the whole estate of the debtor is pursued in a summary manner, and payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of the contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiffs no longer had an option. By bringing the first action, after knowledge of the fraud practised by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election.' The principle applied in Foundry Company v. Hersee, 103 N. Y. 26, and Hays v. Midas, 104 N. Y. 602, requires this construction, for the present contains the element lacking in those cases, viz., knowledge of the fraud practised by the vendee; and by reason of it the plaintiffs were put to their election.

"It is not at all material to the question that the plaintiffs discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any steps to enforce the contract was a conclusive election not to rescind it on account of any thing known at the time. After that the option no longer existed,

and it is of no consequence whether or not the plaintiffs made their choice effective."

In Connihan v. Thompson, 111 Mass. 270, 272, the court said:

> "The defence of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon."
>
> "The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

See also:

Moller v. Tuska, 87 N. Y. 166;
Acer v. Hotchkiss, 97 N. Y. 395;
Stevens v. Pierce, 151 Mass. 207;
Kinney v. Kiernan, 49 N. Y. 164;
Thompson v. Howard, 31 Mich. 309;
Farwell v. Myers, 59 Mich. 179;
Thomas v. Sugerman, 157 Fed. 669;
Terry v. Munger, 121 N. Y. 161.

VIII.

THE DECREE.

The decree, now appealed from (Transcript, p. 194), adjudges that complainant (appellee) "have and recover from the estate of John M. Smith, deceased, and from Mary M. Smith, as executrix of the estate of John M. Smith, deceased, defendant, the sum of * * * * * $24721.24" with costs, and interest. In the 15th subdivision of the assignment of errors (Transcript, 200) and in this brief, *supra*, this decree is assailed as not being in accordance with the statutes of Montana. This instant case is one in which those statutes are invoked, and sought to be enforced, for the purpose of having appellee's claim allowed as a claim against appellant's estate, for it is alleged in the bill of complaint (Transcript, p. 15) that the claim was presented to the executrix for allowance or rejection; that because of non action thereon for ten days complainant, appellee, elected to consider the same rejected (Revised Codes, § 7528); and that within three months thereafter the present action was begun (As Rev. Codes, § 7530 prescribes). Doubtless jurisdiction exists in the Federal courts in that regard, but only to the extent and in the manner that the state courts could exercise such jurisdiction, for on this precise point this court has said in Newberry v. Wilkinson (9 C. C. A.), 199 Fed. 679:

> "Equity jurisdiction in the federal courts, however, may yet be said to extend to the admin-

istration of the estates of deceased persons sub modo—that is, where it concerns citizens and residents of different states; but it is an inexorable rule that, in the exercise of such jurisdiction, such courts will be governed and controlled by the statutory rules and regulations of the states pertaining to the administration and the settlement of such estates. Security Trust Co. v. Black River National Bank, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147. In short, the federal equity courts, when occasion requires, for the protection of proper parties concerned, will administer the local probate procedure, but in obedience to the local law governing the same."

With this rule in mind it becomes necessary to ascertain what the state statutes and the decisions of the state Supreme Court construing the same are. When a claim is rejected, under the provisions of Rev. Codes, § 7530, the holder must bring suit in the proper court within three months thereafter, otherwise the claim shall be forever barred. The only kind of judgment which the court can render in such an action is that prescribed by Revised Codes, § 7536, which reads:

"A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the docket of the

judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment."

This statute has been construed by the Supreme Court of Montana; thus in Gauss v. Trump, 48 Mont. 92, 135 Pac. 910, wherein was attacked a judgment in the precise form of the one at bar, the court said, page 101:

> "The form of the judgment is assailed, and rightly so. It provides that the plaintiff 'have and recover' from the defendant, as administratrix, the amount of the verdict and costs, whereas, it should simply have adjudged that the defendant, as administratrix, pay in due course of administration the amount ascertained to be due."

And this, too, has been the ruling of the California Supreme Court from which state our statute was taken.

See Vance v. Smith, 124 Cal. 219, 56 Pac. 1031.
Moore v. Russell, 133 Cal., 297, 65 Pac. 624.

Clearly, then, even if the decree appealed from be affirmed, it should be so only to the extent that the claim involved herein be established as provided for by said Revised Codes, § 7536.

But we submit that the decree should be reversed and not modified. All of which is respectfully submitted.

R. LEE WORD,
H. G. & S. H. McINTIRE,
Solicitors and of Counsel for Appellant.